In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1979

EDWIN L. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his conviction on the grounds that (1) 29 U.S.C. 501(c) applies only to "constitutional officers" of a union; (2) the trial court erred in refusing to give certain instructions requested by petitioner; (3) his indictment was based on information improperly obtained by the grand jury; and (4) the jury's verdict of guilty was not supported by sufficient evidence.

After a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of two counts of unlawfully and willfully embezzling, stealing, abstracting and converting to his own use money and funds of the International Union of Operating Engineers, Local No. 57, without proper authorization by and benefit to said Local, in violation of 29 U.S.C. 501(c). He

was fined $1,500.[1] The conviction also made petitioner ineligible to hold union office for five years, 29 U.S.C. 504(c). The court of appeals affirmed (Pet. App. 19-29).

1. The evidence showed that, except for periods of military service, petitioner had been a member of Local 57 of the International Union of Operating Engineers since 1942, and a Union employee since 1950 (Tr. 257, 279).[2] Petitioner was also appointed to the office of "guard" in the Local (Govt. Ex. 1; Tr. 213, 259, 290, 365), and he held that office, as well as being a union employee, throughout the period of the transactions in question here (Tr. 275). The duties of the guard were mainly ritualistic in nature (see Pet. 9). Petitioner's responsibilities as a union employee involved the collection of members' monthly dues, which required that he be bonded (Tr. 73, 87, 304-306), and the preparation of Local 57's checks at the direction of one of the Whites (Tr. 282-283).[3]

The transactions to which petitioner's conviction related consisted of his receipt of unauthorized salary increases between July 1968 and December 31, 1970,[4] and

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[1]The indictment contained sixteen counts, alleging a conspiracy to embezzle, steal, abstract, or convey union funds by John White, Sr., then business manager of Local 57 (Tr. 103-104), John White, Jr., then president of and business agent for Local 57 (Tr. 104), and petitioner. White, Sr. was declared incompetent to stand trial and White, Jr. died before trial. Petitioner was tried on only two counts.

[2]"Tr." designates the transcript of the trial, a copy of which has been lodged with the Clerk of this Court.

[3]At the time of the trial, petitioner was business manager of the Local (Tr. 402-403). He remains in that office pending the outcome of this petition for a writ of certiorari, see 29 U.S.C. 504(c).

[4]The total gross amount of salary increases received by petitioner was $5,589.

his receipt of unauthorized Christmas bonuses during that period.[5] Petitioner conceded receipt of the increases and bonuses, but he testified that at the time of receipt he did not believe that the payments were illegal (Tr. 278, 331-332).

At all relevant times the Union's constitution prohibited payments of Local funds for gifts or additional compensation, unless approved by the membership of the Local and the General President of the Union (Govt. Ex. 8; Tr. 55, 117). Although authorizations for expenditures were customarily recorded, the minute book of Local 57 contained no reference to approval of the salary increases and bonuses paid to petitioner (Govt. Ex. 1; Tr. 26, 115-116, 126-127, 201-202, 205-206, 341-351).

2. Petitioner's contention that his indictment should have been quashed because union records subpoenaed by federal grand jury were transmitted to a second grand jury rather than returned to the union (Pet. 6-7) is without merit. Although not mentioned in the petition, this issue was fully considered and decided adversely to petitioner's contentions in *In re Grand Jury Subpoena of John A. White, President, International Union of Operating Engineers, Local 57* (C.A. 1, No. 72-1277), certiorari denied *sub nom. International Union of Operating Engineers, Local 57* v. *United States*, 411 U.S. 948.[6] There is, thus, no occasion for further review of this issue.

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[5]The bonuses were paid out of checks drawn by the Local payable to either John White, Sr. or to cash. The total amount of the checks was $3,600. Petitioner received bonuses totaling $445.

[6]The facts relating to this issue are set forth in our memorandum in *International Union of Operating Engineers, Local 57* v. *United States*, No. 72-1102, a copy of which is being served on petitioner.

In addition, since the records in question were union records as to which petitioner has no proprietary interest, he has no standing to complain about their use by the grand jury. Nor can petitioner challenge his indictment on the ground that union records should have been returned to the union and resubpoenaed by the grand jury. See *United States* v. *Calandra*, 414 U.S. 338.

3. Petitioner's second contention is that 29 U.S.C. 501(c) applies only to those union offices enumerated in 29 U.S.C. 402(q) and 501(a), which petitioner describes as offices with fiduciary responsibilities (Pet. 7-10). This contention is contrary to the plain language of 29 U.S.C. 501(c), which provides in relevant part as follows:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the uses of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, *or by which he is employed*, * * * shall be fined * * *. [Emphasis added.]

The court of appeals held that while a fiduciary relationship may be a necessary element of embezzlement under 29 U.S.C. 501(c), it is not required for stealing, abstracting, or conversion—activities that are also covered by Section 501(c).

Moreover, the court of appeals correctly held that even assuming petitioner's construction of Section 501(c) to be correct, the record showed that petitioner was an "officer" within the meaning of 29 U.S.C. 501(a) or a "key administrative" employee within the meaning of 29 U.S.C. 402(q). (See Pet. App. 23-25.)

4. Petitioner's remaining contentions are also without merit:

(a) For the reasons stated above, the district court properly refused to instruct the jury that it must find that petitioner was a "constitutional" officer in order to convict for a violation of 29 U.S.C. 501(c).

(b) Considering the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, there was sufficient evidence supporting the jury's verdict of guilty. As the court of appeals held (Pet. App. 28-29):

> Although there was no direct evidence of defendant's knowledge that the payments were unauthorized, we think that this was inferable from the government's other proof. In the first place, the union's minute book indicated that defendant attended virtually every meeting of the general membership during the period covered by the indictment, including all meetings immediately preceding his July 15, 1968, raise and his December 1968, 1969 and 1970 bonuses. Since the constitution required that the general membership approve of these payments, and since his attendance at those meetings must have made it plain to him that no such approval was ever given or even considered, it was clearly reasonable for the jury to conclude that defendant did, in fact, know that the payments were improper and illegal. Secondly, the evidence establishes a closer working relationship between defendant and the Whites, who effectively ran the union. To the extent that the evidence also suggested that the Whites knew, or must have known, that these and other payments were illegal, it was permissible for the jury to infer that defendant possessed the same knowledge. Thus, in our view, the evidence satisfactorily established that defendant, a union officer and employee, improperly received for

his own benefit misappropriated and unauthorized union funds, knowing that his receipt of those funds was unlawful. Such evidence is, we believe, sufficient to sustain his conviction under §501(c).

(c) Prior to trial the United States Attorney agreed with petitioner's counsel not to refer in his opening statement to White, Sr., and White, Jr., both of whom were named in the indictment but were not tried with petitioner. The trial judge did not participate in and was not bound by the agreement, and his reference to the Whites in reading to the jury the two counts of the indictment involving petitioner was within his discretion. See *United States* v. *Marquez*, 424 F. 2d 236, 240 (C.A. 2), certiorari denied, 400 U.S. 828.

(d) Petitioner's contention that the trial judge failed to instruct the jury on the common law definitions of embezzlement, stealing, abstracting and converting (Pet. 16) is refuted by the judge's charge, in which he meticulously defined each of those terms (Tr. 443). A fair reading of the charge could leave no doubt that the jury was adequately advised of the elements of the offense. See *United States* v. *Brill*, 350 F. 2d 171, 176 (C.A. 2), certiorari denied *sub nom. Scalza* v. *United States*, 382 U.S. 973; *Woxberg* v. *United States*, 329 F. 2d 284, 290 (C.A. 9), certiorari denied, 379 U.S. 823.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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